Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-1736

APEX OIL COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

	Page
Statement of Jurisdiction	1
Questions for Review	2
The Statute Involved	2
Statement of the Case	2
Argument	6
Appendix	A-1

Cases Cited

Kennedy v. Mendoza Martinez, 372 U.S. 144 (1963)	7
Pettibone v. United States, 148 U.S. 197 (1893)	8
Trop v. Dulles, 356 U.S. 86, 95 (1958)	7
United States v. Debrow, 346 U.S. 374 (1953)	8
United States v. Hess, 124 U.S. 483, 486 (1888)	8
United States v. LeBeouf Bros. Towing Co., 377 F.Supp. 558 (E.D. La. 1974)	7
United States v. Standard Brewery, 251 U.S. 210, 220 (1920)	8
United States v. W. B. Enterprises, Inc., 378 F.Supp. 420 (S.D.N.Y. 1974)	7

Statutes Cited

28 U.S.C. Section 1254	1
33 U.S.C. Section 1321	6, 8
33 U.S.C. Section 1321(b)(5)	2, 6, 7, 8
33 U.S.C. Section 1321(b)(6)	4, 6, 7
33 U.S.C. Section 1321(n)	3

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No. .....

APEX OIL COMPANY,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Comes now Apex Oil Company and respectfully petitions the United States Supreme Court to issue a Writ of Certiorari in the case of United States of America v. Apex Oil Company, Cause No. 75-1775 Cr., Eighth Circuit Court of Appeals.

STATEMENT OF JURISDICTION

The entry of judgment and opinion of the Eighth Circuit was filed March 8, 1976. A timely Petition for Rehearing was filed on March 22, 1976, which was denied March 29, 1976. A copy of the Opinion of Court is appended hereto. On April 8, 1976, Associate Justice Harry A. Blackmun entered an order extending the time to file a petition for writ of certiorari to and including May 28, 1976. Jurisdiction of the United States Supreme Court to review this case by Writ of Certiorari is conferred by 28 U.S.C. Section 1254.

QUESTIONS FOR REVIEW

The questions presented for review are (1) whether a corporation is liable under 33 U.S.C. Section 1321(b)(5) for the failure of its employee to report an oil discharge, and (2) whether convictions for failing to report an oil discharge can be sustained where there was no pleading or proof that the corporate defendant had knowledge of the oil discharge.

THE STATUTE INVOLVED

This case involves the construction of 33 U.S.C. Section 1321 (b)(5), enacted in the Water Pollution Control Act Amendments of 1972, which states:

> "Any person in charge of a vessel or of an onshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement."

STATEMENT OF THE CASE

The two prosecutions for failing to report an oil discharge in violation of 33 U.S.C. Section 1321(b)(5) arose out of oil spills at petitioner's terminal facility in St. Louis, Missouri. The

prosecutions were instituted in the federal court of the Eastern District of Missouri, pursuant to the grant of jurisdiction in 33 U.S.C. Section 1321 (n).

The grand jury indictment charged in Count II that "on or about January 12, 1974 . . . Apex Oil Company, the 'Person in Charge,' unlawfully and knowingly failed to notify the appropriate agency of the United States Government of the discharge of a harmful quantity of oil from its facility into a navigable water of the United States." Count III of the indictment likewise charged that "on or about January 14, 1974 . . . Apex Oil Company, the 'Person in Charge,' unlawfully and knowingly failed to notify the appropriate agency of the United States Government of the discharge of a harmful quantity of oil from its facility into a navigable water of the United States."

Both parties agreed to a Stipulation of Facts as to Counts II and III. As to Count II, the Stipulation stated in pertinent part:

> "Sometime on the morning of January 12, 1974, which was a Saturday, a tank barge owned by Apex Oil Company was offloading a cargo of aromatic No. 2 oil at the aforesaid facility when a gasket in the facility piping failed, allowing approximately 10 gallons of the oil to flow onto the facility deck and subsequently into the river. The person in charge at the time of the spill was one Robert J. Smith, an employee of Apex Oil Company.
>
> Smith promptly spread an absorbent on the facility deck to prevent further pollution, but did not report the spill, although he was the only known witness to the occurrence.
>
> * * * * * * *
>
> Mr. Smith admitted that the spill resulted from operations of the Apex Oil Company, and he admitted prior knowledge of the spill. Mr. Smith, as the person in charge of

the Apex Oil Facility on the morning of January 12, 1974, failed to notify the Coast Guard or the Environmental Protection Agency of the aforementioned spill. . . . There is no evidence that the officers or directors of the Apex Oil Company had any knowledge of this spill prior to the time when the Coast Guard ascertained that it came from the facility of Apex, as above described."

As to Count III, the Stipulation stated in pertinent part:

"At about 9:00 A.M. on the morning of January 14, 1972, a cargo transfer hose at Apex Oil Company's facility at the foot of Mullanphy Street was ruptured causing approximately 294 gallons of No. 6 oil to be spilled into the Mississippi River. The spill was discovered by a Coast Guard Port Safety Team at 11:20 A.M. the same morning, when it found Apex personnel removing oil from the facility deck and water.

. . . The person in charge at the time of the spill was James Washington, an employee of the Apex Oil Company. The person in charge of the Apex facility at the time of the spill did not notify the Coast Guard nor the Environmental Protection of the oil spill. There is no evidence that the officers or directors of the Apex Oil Company had any knowledge of the spill prior to the time when it was discovered by the Coast Guard."

Apex Oil Company paid a penalty of $500.00 and $200.00 respectively for each of these oil spills under 33 U.S.C. 1321(b)(6), which states in pertinent part:

"Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged . . . shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense."

On the Stipulation of Facts the district court found Apex Oil Company guilty on Counts II and III of the indictment on September 16, 1975. A copy of the District Court Order is appended hereto. Apex Oil Company's Motion for New Trial was denied, and Apex Oil Company was fined $10,000.00 on each count, with $15,000.00 stayed on the condition that Apex Oil Company not violate "any of these laws relating to pollution" during a three year probationary period. Notice of Appeal to the Eighth Circuit Court of Appeals was timely filed. On March 8, 1976, the Eighth Circuit affirmed the District Court in an opinion a copy of which is appended hereto.

ARGUMENT

In this case, the Court of Appeals for the Eighth Circuit has decided two questions of federal law, one of which is of great public concern and has not been, but should be, settled by the Supreme Court of the United States, and the other involves a conflict between the decision of the Eighth Circuit and applicable decisions of the United States Supreme Court. Certiorari should therefore be granted to review the decision of the Eighth Circuit in this case.

The first question presented for review involves judicial interpretation of federal law under 33 U.S.C. Section 1321, which, as reprinted above, imposes criminal liability on "any person in charge of a vessel or of an onshore facility" who fails to notify the Government agency after he has knowledge of a discharge of oil or hazardous substance. As the facts of this case reveal, under both counts of the indictment, an employee of petitioner failed to notify the Coast Guard of an oil spill. Said employee was the sole person in charge of the onshore facility and no corporate officer had knowledge of the oil spills. Petitioner paid fines for both spills as the "owner or operator" of the facility under 33 U.S.C. Section 1321(b)(6) as reprinted above. However, the Government charged petitioner with failing to notify as "the person in charge." Petitioner asserts that the Congressional intent in 33 U.S.C. Section 1321(b)(5) was that the individual operationally responsible for the facility is the "person in charge" under that subsection. The Eighth Circuit held to the contrary, when it decided that the corporation is a "person in charge" under Section 1321(b)(5).

The decision of the Eighth Circuit will serve only to hinder effective water pollution laws. Under this decision, if the employee of an oil company notifies the government agency of an oil spill the corporation cannot be held liable for a penalty under

Section 1321(b)(6) since the corporation as the "person in charge" would be given statutory immunity from criminal prosecution on information received pursuant to such notification. It has been held that such immunity applies to Section 1321(b)(6) despite its label as a civil penalty. United States v. LeBeouf Bros. Towing Co., 377 F.Supp. 558 (E.D. La. 1974).[1]

Many decisions of this Court have likewise held that it is the substance of the penalty and not its label that decides the question of whether the penalty is criminal or civil. See Kennedy v. Mendoza Martinez, 372 U.S. 144 (1963); Trop v. Dulles, 356 U.S. 86, 95 (1958). The decision of the Eighth Circuit completely rejects said holdings. See Opinion, note 7.

Therefore, if the decision of the Eighth Circuit is allowed to remain uncorrected, the corporation responsible as "owner or operator" for pollution under Section 1321(b)(6) can discharge oil or any hazardous substance without liability as long as it notifies the government agency of such discharge. Such was clearly not the intent of Congress in enacting the water pollution laws. The conclusion that the corporation was not intended to be the "person in charge" under Section 1321(b)(5) is further reinforced by the legislative history of the adoption of Section 1321, and by the regulations of the Coast Guard which, without exception, treat the "person in charge" as the individual operationally responsible for the vessel or onshore facility. The decision of the Eighth Circuit concludes that these regulations are erroneous, even though they were enacted by the agency responsible for administration of the water pollution statute and as such are entitled to great deference. United States v. W. B. Enterprises, Inc., 378 F.Supp. 420 (S.D.N.Y. 1974). The decision of the Eighth Circuit is a clearly erroneous interpre-

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[1] It should be here noted that this decision has been appealed and argued to the Fifth Circuit and is awaiting decision thereon. We would therefore ask leave of court to supplement this petition with a copy of the Fifth Circuit decision when rendered.

tation of the Congressional intent in enacting the water pollution statutes. As such, the decision will defeat the purpose of said statutes to prevent water pollution. Such a result is clearly of great public importance. The Supreme Court should therefor review the decision of the Eighth Circuit in order to settle this question of first impression under 33 U.S.C. Section 1321, as enacted in the recent Water Pollution Control Act Amendments of 1972.

The second question presented for review is whether the Eighth Circuit decision sustaining the convictions is in conflict with applicable decisions of the United States Supreme Court. The Eighth Circuit rejected petitioner's contention that the indictment (reprinted above) was fatally deficient for failing to allege knowledge of the oil discharge, which is an essential element of the crime of failing to report under 33 U.S.C. Section 1321(b)(5). (See Opinion, note 11). Petitioner asserts that a plain reading of the indictment reveals that it only alleges that the corporation knew it had not reported the oil discharge, not that it knew of the oil discharge and yet knowingly failed to report said discharge. Failure to make such an essential allegation necessitates a reversal of the conviction under applicable decisions of the United States Supreme Court. United States v. Debrow, 346 U.S. 374 (1953); United States v. Standard Brewery, 251 U.S. 210, 220 (1920); Pettibone v. United States, 148 U.S. 197 (1893); United States v. Hess, 124 U.S. 483, 486 (1888). The decision of the Eighth Circuit is clearly contrary to these decisions and should therefore be reviewed by the Supreme Court of the United States.

For the aforesaid reasons, petitioner prays that this Court issue its Writ of Certiorari to correct the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted

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APPENDIX

United States District Court
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff vs. Apex Oil Company, Defendant.	No. 75-127 cr (1).

ORDER

This matter is submitted upon stipulation of facts and briefs of the parties.

The Government has moved to dismiss Count I, which is granted, and

It Is Hereby Ordered that Count I is dismissed.

A review of the evidence and the briefs of the parties leads the Court to the conclusion, and the Court hereby finds, the defendant guilty on Count II and guilty on Count III.

Defendant is ordered to report on Friday, October 3, 1975, at 10:00 a.m., for sentencing.

Dated this 16th day of September, 1975.

/s/ JAMES H. MEREDITH
United States District Judge

United States Court of Appeals
for the Eighth Circuit

No. 75-1775

Apex Oil Company, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: January 15, 1976

Filed: March 8, 1976

Before Heaney, Ross and Webster, Circuit Judges.

Heaney, Circuit Judge.

Apex Oil Company, a Missouri corporation whose business includes the transportation and storage of various types of fuel oil, appeals from a final judgment of conviction on two counts of a three-count indictment[1] for failing to notify an appropriate agency of the United States government of a known oil spill in violation of the Water Pollution Control Act, 33 U.S.C. § 1321(b)(5). It was fined a total of $20,000 and placed on probation for three years. The execution of $15,000 of the fine was stayed on the condition that the corporation not violate any law

[1] Count one of the indictment was dismissed on the government's motion.

relating to pollution during the probationary period. Two issues are raised on appeal: (1) whether the corporation is a "person in charge" within the meaning of 33 U.S.C. § 1321(b)(5), and (2) whether the evidence was sufficient to support the conviction. We affirm.

I

Section 1321(b)(5) of Title 33 of the United States Code, upon which the convictions are based, states in relevant part:

> Any person in charge of * * * an onshore facility * * * shall, as soon as he has knowledge of any discharge of oil * * * from such * * * facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notifications shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

The appellant argues that only an individual, or natural person, and not a corporation, can be a "person in charge" within the meaning of the statute and, hence, it cannot be prosecuted.

A "person," as defined by the Act, "includes an individual, firm, *corporation,* association, and a partnership[.]" 33 U.S.C. §1321(a)(7) (Emphasis supplied.) Apex Oil, thus, raises a distinction between the meaning of "person" when used alone and its meaning when used in conjunction with the words "in charge." It is a distinction which the Act does not itself make.

United States v. Hougland Barge Line, Inc., 387 F.Supp. 1110, 1113 (W.D. Pa. 1974). *See* 33 U.S.C. §1321(a). It is, moreover, a distinction that cannot be supported by the purposes of the Act.

Section 1321(b)(5) prompts the timely reporting and discovery of oil discharges into or upon the navigable waters of the United States to facilitate the mitigation of pollution damage. It is designed to insure, so far as possible, that small discharges will not go undetected and that the possibility of effective abatement will not be lost.[2] *United States v. Mobil Oil Corporation*, 464 F.2d 1124, 1127 (5th Cir. 1972); *United States v. General American Transportation Corp.*, 367 F.Supp. 1284, 1288 (D. N.J. 1973). The purpose is best served by holding the corporation responsible under the provision of the statute. We agree with the analysis of the Fifth Circuit:

> The owner-operator of a vessel or a vacility [sic] has the capacity to make timely discovery of oil discharges. The owner-operator has power to direct the activities of persons who control the mechanisms causing the pollution. The owner-operator has the capacity to prevent and abate damage. Accordingly, the owner-operator of a facility governed by the WPCA, such as the Mobil facility here, must be regarded as a "person in charge" of the facility for the purposes of §1161. A more restrictive interpretation would frustrate congressional purpose by exempting from the operation of the Act a large class of persons who are uniquely qualified to assume the burden imposed by it.

We conclude that an owner-operator is "in charge" of his facility within the meaning of §1161. It necessarily follows that a corporate owner, a "person" within the

[2] The cleanup efforts by Apex Oil upon the discharge constituting Count three was about ten percent effective.

> statutory definition, is a "person in charge" of the facilities it owns and operates[.][3]

United States v. Mobil Oil Corporation, supra at 1127. *Accord, United States v. Republic Steel Corporation*, 491 F.2d 315 (6th Cir. 1974) (per curiam).[4]

The contention of Apex Oil, premised on *United States v. Skil Corporation*, 351 F.Supp. 295 (N.D. Ill. 1972), that only an individual or natural person can be a "person in charge" under the statute, removes an important incentive for a corporation to train and supervise its employees on the reporting requirements of the Act. Indeed, such a construction of the statute would, in the case of a corporation bent upon evading the civil penalty of §1321(b)(6),[5] provide an incentive not to report all small spills that are not likely to be detected or traced to their origin. It would pit the employee, on pain of

[3] The decision of the Fifth Circuit proceeded under 33 U.S.C. § 1161(b)(4), the predecessor to 33 U.S.C. § 1321(b)(5). The language of each is identical.

[4] We repeat the observation of the Sixth Circuit:

> We note that the Water Quality Improvement Act of 1970 has been amended by Congress since the decision in United States v. Mobil Oil Corporation * * * was rendered and the language of § 1161(b)(4) was not changed. This indicates an acceptance by Congress of the construction placed on this statute by the Fifth Circuit.

United States v. Republic Steel Corporation, 491 F.2d 315, 317 (6th Cir. 1974) (per curiam).

[5] 33 U.S.C. § 1321(b)(6) states in part:

> Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph 3 of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense.

Apex Oil was assessed fines totaling $700 under this statute which it has paid.

fine or conviction under §1321(b)(5), against his employer.[6] The appellant's contention is counterproductive to the purposes of the Act.[7]

Nor do we agree wtih the argument of Apex Oil that the inclusion of the corporation within the meaning of "person in charge" is inconsistent with the use in the civil penalty provision of § 1321(b)(6) of the words "owner or operator." The fallacy of the argument is exposed by the definition of "owner or operator." Section 1321(a)(6) states:

> "[O]wner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment[.]

The phrase "owner or operator" thus designates persons of a particular proprietary class as does the phrase "person in charge." There is no inconsistency. The corporation, being a

[6] Section 1321(b)(5) speaks in terms of any person in charge. We note that it would not be inconsistent with the statutory language to hold both the employee and the corporation to its penalties for failure to report a spill.

[7] The appellant argues that our holding will have an "emasculating effect" because the corporation that does report a spill will not only avoid the criminal penalty under § 1321(b)(5) but also the civil penalty under § 1321(b)(6). It reads the immunity provision of the former statute which applies "in any criminal case" as applicable to the civil penalty of the latter on the theory that the civil penalty is in fact criminal. This issue is now before the Fifth Circuit in *United States of America v. LeBeouf Bros. Towing Co., Inc.*, No. 74-3140. The lower court decision is reported at 377 F.Supp. 558 (E.D. La. 1974). It is clear to us that Congress intended no such result, for it specifically stated that the penalty under § 1321(b)(6) was civil in nature. *See* n.5 *supra*.

"person" within the statutory definition, is included within the meaning of both.[8]

The appellant also places reliance upon its reading of the legislative history and the regulations of the Coast Guard.[9] Both speak in terms of an individual as being a "person in charge."

But the legislative history is, at best, inconclusive and does not provide the support necessary to depart from the conclusion, based upon the statutory definition of "person" and the purposes of the Act, that a corporation is a "person in charge" under § 1321(b)(5). Moreover, it must be observed that corporate actions necessarily require the conduct of individuals. The corporation acts no less through its supervisor at the oil facility than it does through a director or officer. To the extent that guidance can be gleaned from the legislative history, it suggests that liability under the statute is to be limited to those responsible for the operation of the oil facility. The corporation is certainly within that class. *United States v. Mobil Oil Corporation, supra* at 1128; *United States v. General American Transportation Corp., supra* at 1288. *See* Conference Report No. 91-940, 1970 U.S. Code Cong. & Ad. News 2719. Finally, we note that the appellant argues solely from the language of the House Bill which used the phrase "individual in charge" and which was abandoned for the Senate's broader phrase "person in charge." *See United States v. Mobil Oil Corporation, supra* at 1128.

The regulations of the Coast Guard are equally unpersuasive. It is true that they define "person in charge" as being an individual. *See* 33 C.F.R. § 153.01(g). But it is also true that they do not address the issue before us. The purpose of the

[8] We do not suggest that the class of persons included within the meaning of "owner or operator" and "person in charge" are identical.

[9] *See* 33 C.F.R. §§ 153.01 *et seq.*

regulations is to proscribe the manner in which the reporting duties of the statute will be fulfilled in daily practice. *See* 33 C.F.R. § 153.100(b). This purpose necessarily requires that the regulations speak to the individuals who act for the corporation. *See Ritchie Grocer Co. v. Aetna Casualty & Sur. Co.*, 426 F.2d 499, 500 (8th Cir. 1970) (per curiam); *Parker v. United States*, 126 F.2d 370, 374 (1st Cir. 1942). It does not follow, however, that only individuals can be liable under the criminal provisions of § 1321(b)(5). When the administrative expertise is not addressed to the issue under consideration, there is no occasion to defer to its determination.[10] Moreover, were we convinced that the regulations spoke to the issue, we would find that they erroneously interpreted the meaning of the statute. *See Wilderness Society v. Morton*, 479 F.2d 842, 865 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973).

II

Apex Oil also argues that the proof was insufficient to support the convictions. The case was tried on stipulated facts, the pertinent portions of which we repeat.

Count two of the indictment arose out of an offloading operation at one of the appellant's facilities located at the foot of Mullanphy Street in St. Louis, Missouri. During that operation, on the morning of January 12, 1974, approximately ten gallons of aromatic No. 2 oil spilled into the Mississippi River. Robert J. Smith, an employee of Apex Oil, was in charge and is the only known witness to the spill. He notified neither the Coast Guard nor the Environmental Protection Agency. The spill was later traced by the Coast Guard, upon the report of

[10] The case cited by the appellant, *United States v. W. B. Enterprises, Inc.*, 378 F.Supp. 420 (S.D. N.Y. 1974), is, for this reason, inapposite. In that case, the issue was the meaning of § 1321(b)(6) which provides for the assessment of civil penalties. The power to assess the civil penalty there prescribed is delegated to the Coast Guard. *See* 33 C.F.R. § 153.03(b)(1).

a third party, to the Apex Oil facility. No officer or director of the corporation had knowledge of the spill prior to the determination by the Coast Guard of the spill's origin.

The facts surrounding Count three of the indictment are substantially similar. On January 14, 1972, two hundred ninety-four gallons of No. 6 oil spilled into the Mississippi River. The spill was discovered the same morning by a Coast Guard Port Safety Team. The employee in charge of the facility at the time of the spill, James Washington, did not notify the Coast Guard or the Environmental Protection Agency. No officer or director of Apex Oil had knowledge of the spill prior to its discovery by the Coast Guard.

From these facts, the appellant argues that the government failed to prove that it was "in charge" at the time of the spills and that it had knowledge of their occurrence.

Each argument is meritless. The corporation is no less "in charge" of the oil facility than is its employee. *See New York Central & H.R.R. Co. v. United States*, 212 U.S. 481, 494 (1909); *United States v. Hilton Hotels Corporation*, 467 F.2d 1000, 1004 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). Further, the knowledge of the employees is the knowledge of the corporation.[11] *See United States v. A & P Trucking Co.*, 358 U.S. 121, 125 (1958); *Ritchie Grocer Co. v. Aetna Casualty & Sur. Co.*, *supra* at 500.

The judgment of conviction on Counts two and three is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

[11] We similarly reject the appellant's contention that the indictment was deficient for failing to allege knowledge. Each count of the indictment alleged that there was a knowing failure to report.

United States Court of Appeals
For the Eighth Circuit

75-1775 September Term, 1975

The United States, Appellee, vs. Apex Oil Company, Appellant.	}	Appeal from the United States District Court for the Eastern District of Missouri.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

March 29, 1976

No. 75-1736

Supreme Court, U. S.
FILED
JUL 28 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

APEX OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

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APEX OIL COMPANY, PETITIONER

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-9) is reported at 530 F. 2d 1291. The order of the district court (Pet. App. A-1) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1976, and a timely petition for rehearing (Pet. App. A-10) was denied on March 29, 1976. On April 8, 1976, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari until May 28, 1976, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a corporate owner-operator can be prosecuted as the "person in charge" of a polluting facility,

as that term is used in Section 311(b)(5) of the Federal Water Pollution Control Act.

2. Whether the indictment properly alleged and the evidence sufficiently proved that petitioner knowingly failed to report two oil discharges.

STATEMENT

After a jury-waived trial on stipulated facts in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of failing to report an oil discharge, in violation of 33 U.S.C. (Supp. IV) 1321(b)(5). Petitioner was fined $10,000 on each count and placed on probation for three years; however, execution of $15,000 of the fine was stayed on condition that petitioner not violate any law relating to pollution during the probation period. The court of appeals affirmed (Pet. App. A-2 to A-9).

As the stipulated facts established, two oil spills occurred at petitioner's terminal facility on the Mississippi River in St. Louis, Missouri (Pet. App. A-8 to A-9). The first spill occurred on January 14, 1972, when a cargo transfer hose at the facility ruptured, causing approximately 294 gallons of oil to spill into the river. One of petitioner's employees, James Washington, was in charge of the facility at the time of the spill, but he did not notify the Coast Guard or the Environmental Protection Agency of the discharge. The Coast Guard discovered the spill later that day when they found petitioner's employees removing oil from the facility deck and the river (Pet. 4; Pet. App. A-9).

The second spill occurred on the morning of January 12, 1974, while one of petitioner's barges was unloading a cargo of oil at the facility. A gasket in the facility's piping system failed, allowing approximately 10 gallons of oil to flow into the river. An employee of petitioner,

Robert J. Smith, was in charge of the facility at the time of the spill and was the only known witness to its occurrence. He did not report the spill to the Coast Guard or the Environmental Protection Agency. Upon information supplied by a third party, the Coast Guard eventually traced the discharge to petitioner's facility (Pet. 3-4; Pet. App. A-8 to A-9).

ARGUMENT

1. Petitioner contends (Pet. 6) that it was improperly convicted of failing to report these discharges because it was not the "person in charge" of the facility at the time of the spills, as that term is used in Section 311(b)(5) of the Federal Water Pollution Control Act, as added, 86 Stat. 864, and amended, 33 U.S.C. (Supp. IV) 1321(b)(5). It argues that Congress intended that the individual actually responsible for the operations of the facility be considered the "person in charge."

However, the court of appeals properly held (Pet. App. A-3 to A-8) that a corporation could be a "person in charge" within the meaning of Section 311(b)(5). Under Section 311(a)(7) of the Act, as added, 86 Stat. 862, and amended, 33 U.S.C. (Supp. IV) 1321(a)(7), the class of "persons" subject to the Act "includes an individual, firm [or] corporation * * * ." The legislative history of the Act, the court of appeals concluded, "suggests that liability under the statute is to be limited to those responsible for the operation of the oil facility. The corporation is certainly within that class" (Pet. App. A-7). In short, nothing in the language or legislative history of the Act bars application of the familiar doctrine of *respondeat superior* under these circumstances.

The court below correctly noted (Pet. App. A-4 to A-6) that petitioner's proposed construction of this phrase would frustrate the very purposes of the Act. The

corporate owner of industrial facilities is uniquely qualified to assume the burdens of complying with the Water Pollution Control Act and has full authority to direct the activities of its employees to minimize the potential for such accidental discharges. If a corporation were not considered a "person in charge" of the facility, it would have little incentive to train its employees to comply with the Act by reporting small spills, to the ultimate detriment of the environment.[1]

Moreover, as the court of appeals held (Pet. App. A-7 to A-8), the Coast Guard regulations establishing the procedures to be followed by the individual "person in charge" of a facility in reporting spills do not address the question whether corporations can be liable under the criminal provisions of Section 311(b)(5). See 33 C.F.R. 153.01(g). Thus, the court below properly did not defer to the definition of "person in charge" contained in those regulations.

The decision below is in agreement with the decicions of the other two courts of appeals that have considered this question. *United States* v. *Mobil Oil Corp.*, 464

[1]This case presents no occasion to review the question whether Section 311(b)(6), as added, 86 Stat. 864, and amended, 33 U.S.C. (Supp. IV) 1321(b)(6), imposes a criminal or civil penalty. Compare *United States* v. *General Motors Corp.*, 403 F. Supp. 1151 (D. Conn.), and *United States* v. *Eureka Pipeline Co.*, 401 F. Supp. 934 (N.D. W. Va.) (civil penalty), with *United States* v. *LeBeouf Bros. Towing Co.*, 377 F. Supp. 558 (E.D. La.) (criminal penalty), appeal pending, C.A. 5, No. 74-3140, argued October 13, 1975. Petitioner raises this issue merely to bolster its policy argument regarding the most effective method of enforcing the Act. However, because it did not report these discharges, the exemption from criminal prosecution provided in Section 311(b)(5) is inapplicable. Thus, petitioner could not attack the imposition of a Section 311(b)(6) fine even if, in derogation of the express congressional intent (Pet. App. A-6, n. 7), it is ultimately determined that such a penalty constitutes a criminal sanction.

F. 2d 1124, 1127 (C.A. 5); *United States* v. *Republic Steel Corp.*, 491 F. 2d 315, 317 (C.A. 6); see *United States* v. *Hougland Barge Line, Inc.*, 387 F. Supp. 1110, 1115-1116 (W.D. Pa.); *United States* v. *General American Transportation Corp.*, 367 F. Supp. 1284, 1287-1289 (D. N.J.); *United States* v. *Reynolds Metals Co.*, 359 F. Supp. 338, 339 (S.D. Tex.); *contra, United States* v. *Skil Corp.*, 351 F. Supp. 295 (N.D. Ill.).

2. Petitioner also contends (Pet. 8) that it was improperly convicted because the indictment did not allege, and the stipulated facts did not prove, an essential element of the offense—that it had actual knowledge of the oil discharges. However, both counts of the indictment alleged that petitioner knowingly failed to report the spills (Pet. App. A-9, n. 11). The stipulated facts established that petitioner's employees in operational charge of the facility had actual knowledge of the discharges. The court of appeals correctly held that the knowledge of its employees could be attributed to petitioner. See *United States* v. *A & P Trucking Co.*, 358 U.S. 121, 125; *New York Central & Hudson River R.R. Co.* v. *United States*, 212 U.S. 481, 494. Therefore, the stipulated facts satisfied the scienter requirement of Section 311(b)(5). Thus, the indictment was not defective, and the evidence was sufficient to support petitioner's conviction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 75-1736

In the Supreme Court of the United States

OCTOBER TERM, 1976

APEX OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
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To support its policy argument concerning the most effective method of enforcing the oil discharge reporting requirements of the Federal Water Pollution Control Act, 33 U.S.C. (Supp. V) 1321(b)(5), petitioner suggested the emergence of a possible conflict among the courts of appeals regarding whether Section 311(b)(6) of that Act, as added, 86 Stat. 864, 33 U.S.C. (Supp. V) 1321(b)(6), imposes a civil or criminal penalty. The sole authority upon which petitioner relied as establishing the putative conflict, *United States* v. *LeBeouf Bros. Towing Co.*, 377 F. Supp. 558 (E.D. La.), has since been reversed by the United States Court of Appeals for the Fifth Circuit, which held, citing the decision of the court of appeals in the instant case, that Section 311(b)(6) creates a civil penalty.

United States v. *LeBeouf Bros. Towing Co.*, No. 74-3140, decided August 16, 1976, slip op. at 5116.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

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[1]We are lodging with the Clerk of this Court a copy of the Fifth Circuit's decision.